IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Crim. Application No. 4262 of 2006

Smt.Shabana Shaukat Khan ..Applicant

vs.

The State of Maharashtra ...Respondent

Shri M.S.Mohite for applicant
Shri S.S.Pednekar, A.P.P. for respondent State.

CORAM: S.C.DHARMADHIARI J.
20th December,2006

P.C.

1. Heard Shri Mohite for the applicant and Shri Pednekar, A.P.P. for the respondent State.

2. The applicant has been arrested on 13th June, 2006 in connection with C.R.No.II-32/2006 registered by Bazarpeth Police Station. The offence alleged is punishable under sections 20, 22, 25 and 29 of N.D.P.S.Act.

3. The applicant submits that the entire case is based upon the interrogation of one Deepak Bajaj. He was an accused in C.R.No.231 of 2006. During the course of interrogation he revealed that one Hussain Abu Khan was storing and selling charas. The information was conveyed to the Senior Inspector and accordingly the raid

was arranged. At the place/premises in front of Prince Laundry, the said Hussain Abu Khan was found. Personal search was carried out. The contraband charas was recovered. It weighed about 460 grams. 20 grams of charas was removed as sample and rest of the seized material was sealed.

4. The said Hussain Abu Khan was told by the police that they wanted to search his house. He led the police party to the house at Jamadar Wadi in Kalyan.

5. Shri Mohite submits that the said Hussain Abu Khan stood outside the house and gave a call. On hearing his call the applicant and her husband came out. Thereafter search was carried out in the house and it is alleged in that in the show case which was in the kitchen four plastic bags were found. In all 10 kg. of Charas was seized together with the cash amount. Shri Mohite's submission is that the applicant is related to Hussain Abu Khan. Hussain Abu Khan is her brother in law. Shaukat Khan is the husband of the applicant. His grievance is that merely because the applicant is present in the house she was arrested. However, the applicant and her husband may be staying in the same

structure but they are residing separately. She had no connection with the activities of Hussain Abu Khan. The two families were separated. They were having separate kitchens. There is no allegation that the applicant was either dealing, transporting or guilty in any manner of the offence under the N.D.P.S.Act. The main accused and his family are residing separately. There are separate kitchens. Right through out the applicant has been complaining that merely because the structure is one and the same, it does not mean that the main accused and applicant and her husband are residing jointly. He relied upon the two ration cards. According to Shri Mohite, the names of the applicant and her husband were deleted from the initial common ration card and separate ration card has been issued to them. This was in way back in 2002-2003. Further, the separate house tax and property tax are being paid by the main accused and his family and the applicant. There are receipts issued by the local Municipal Corporation evidencing this fact. In these circumstances, it cannot be said that the applicant is guilty of any offence punishable under N.D.P.S.Act. Bar under sec.37 is thus not attracted.

6. He makes a serious complaint that the learned Trial Judge was influenced by the fact that no grievance was made by the applicant during the course of raid and the argument now advanced is an after thought. Shri Mohite's submission that a woman who is incharge of the kitchen but residing separately with her husband has nothing to do with the main accused and his family and has been roped in merely because she responded to a call from her brother in law and at the relevant time may have been in the house of the brother in law. He relied upon the decisions of this Court in the case of Jeevanchand Baliram Thakur Vs.State of Goa reported in 1988 Cri.L.J.1878; Mohamad Razzak Pathan and others Vs. State of Maharashtra reported in 1995(1) Crimes 207 and an unreported judgment delivered by S.K.Shah J. in Criminal Application No.4410 of 2002 on 23rd January, 2003 in the case of Vinod Kalyanji Bhagat Vs. Inspector of Customs and another.

7. On the last occasion, it was brought to my notice by Shri Mohite that during the course of submissions before the Special Judge, Thane taking N.D.P.S. cases, the Investigating Officer was present and the Investigating Officer has, according to the applicant, orally

pointed out that the applicant and her brother in law are residing in the same house.

8. In such circumstances and considering that the applicant is a woman accused and the case involves her liberty, I called upon the A.P.P. to take instructions and file the affidavit. Now the affidavit is filed by the concerned officer. In the affidavit, it is pointed out that the main accused was told that his house needs to be searched. Since he went with the police and called out from outside his house the present applicant and her husband came out. Thereafter search was carried in the house and in the show-case which was in the kitchen four plastic bags were found. There is no dispute that recovery of 10 kg. is beyond the quantity supplied and, therefore, as far as that aspect is concerned, the same is rightly not pressed. However, the submission of Shri Mohite is that although the structure is the same, the families are residing separately. There is no connection with their activities. The applicant's husband is having the cycle repairing shop. Their kitchens are separate and even they are residing separately.

9. In my view, these materials cannot be taken

into consideration at this stage straightway. The version of the applicant has to be substantiated. The stage to substantiate and rely upon the same is at the trial. The applicant would have to lead evidence to support her plea that the structure may be one but the residence is separate. For that purpose not only the relevant papers including the ration card and property tax receipts have to be produced but their contents are to be proved in accordance with law. At this stage, it cannot be presumed merely by documents being produced or their copies relied upon during the course of oral submissions on the bail application that the applicant and her family is residing separately in the same structure.

10. At this prima facie stage, a conclusion is drawn by the learned Judge that the applicant is a lady and recovery/seizure is from the kitchen. The structure is the same and, therefore, it can safely be presumed that the applicant is connected with the crime and guilty of the offence alleged. The bar under sec.37 is clearly attracted not only that on account of the quantity which is recovered but in possession of the applicant as well. At this stage, it cannot be presumed that the kitchens

are separate and, therefore, subject kitchen does not belong to the applicant and her family.

11. The decisions relied upon and rendered in the peculiar facts of that cases. Further, the Division Bench decision and single Judge's decision are rendered during the course of an appeal against the Trial Court's order of conviction and sentence. For the reasons that I have assigned above and considering the facts and circumstances of this case, the view taken by the Division Bench and the learned single Judge of this Court is of no assistance to the applicant.

12. Consequently, the application is dismissed.

13. However, considering that the case involves woman accused, the learned Judge should endeavour and dispose of the same as early as possible. Need less to state that all the observations made by the learned Additional Sessions Judge as also by me are tentative and prima facie made during the course of disposal of the bail application. They shall not influence the Court while trying the case which should be done on its own merits and in accordance with law.

(S.C.DHARMADHIKARI J.)